

**FEDERAL COMMUNICATIONS COMMISSION
445 12th STREET, S.W.
WASHINGTON, DC 20554**

May 09, 2005

DA 05-1292

In Reply Refer to:

1800B3-JWR/NS

Forever of PA, LLC
and Forever Broadcasting, LLC
c/o Allan G. Moskowitz, Esq.
Kaye Scholer LLC
901 15th Street NW, Suite 1100
Washington, DC 20005

Re: WFBG(AM), Altoona, PA
Facility ID. No. 38269
File No. BAL-20040712AAJ

WFGY(FM), Altoona, PA
Facility ID No. 38265
File No. BALH-20040712 AAK

WLTS(FM), State College, PA
Facility ID No. 38271
File No. BALH-20040712AAL

WRKY-FM, Hollidaysburg, PA
Facility ID No. 72316
File No. BAL-20040712AAM

Applications for Assignment of
Licenses

Dear Mr. Moskowitz:

We have before us the applications (the "Assignment Applications") to assign the licenses of WFBG(AM) and WFGY(FM), Altoona, WLTS(FM), State College and WRKY-FM, Hollidaysburg, all in Pennsylvania, from Forever of PA, LLC ("Forever PA") to Forever Broadcasting, LLC ("Forever Broadcasting"). Also before us is a request for waiver of the Commission's local radio ownership rule, Section 73.3555(a)¹ ("Waiver Request"). For the reasons set forth below, we deny the Waiver Request and dismiss the Assignment Applications.

¹ 47 C.F.R. § 73.3555(a).

Three of the four licenses proposed to be assigned are for stations in Arbitron's Altoona, Pennsylvania Arbitron Metro Survey Area (the "Altoona Metro").² According to BIA, 14 commercial and noncommercial radio stations are "home" to the Altoona Metro. Section 73.3555(a)(1)(iv) provides, in pertinent part, that:

In a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, [a person or single entity (or entities under common control) may have a cognizable interest in] not more than 5 commercial radio stations in total and not more than 3 commercial stations in the same service (AM or FM); provided, however, that no person or single entity (or entities under common control) may have a cognizable interest in more than 50% of the full-power, commercial and noncommercial radio stations in such market unless the combination of stations comprises not more than one AM and one FM station.³

The proposed assignee -- Forever Broadcasting -- is currently the licensee of three other stations in the Altoona Metro: WVAM(AM) and WWOT(FM) (formerly WPRR(FM)), both licensed to Altoona, and WALY(FM), Bellwood, all in Pennsylvania. Grant of the Assignment Applications would result in Forever Broadcasting controlling six commercial stations -- two AM and four FM stations -- in the Altoona Metro, which would violate section 73.3555(a)(1)(iv). Waiver of the rule is thus required before we can approve the proposed transaction.

Forever PA explains in the Application that the assignments are being sought in connection with a proposed "merger of Forever of PA, LLC into Forever Broadcasting, LLC."⁴ In the Waiver Request, Forever PA further explains that the "sole purpose of the application is . . . to simplify the organizational structure of the individuals' ownership for corporate and tax purposes."⁵ The same four individuals are principals (the "Four Principals") of both the assignor and the assignee.⁶ Referencing the Commission's Equity/Debt Plus ("EDP") attribution rule,⁷ Forever PA provides the percentage of "total assets" owned

² The fourth station, WLTS(FM), is home to, and within the geographic boundary of, the State College, PA Metro. Staff analysis confirms that its ownership by Forever Broadcasting would comply with 47 C.F.R. Sec. 73.3555(a).

³ 47 C.F.R. § 73.3555(a)(1)(iv).

⁴ Application at Exhibit 11.

⁵ Waiver Request at 3.

⁶ Currently, the 100% owner and sole member of the assignor, Forever PA, is Forever of PA, Inc. In connection with the proposed transaction, certain non-voting interests held by the shareholders of Forever of PA, Inc. are to be converted to voting interests. The 100% owner and sole member of the assignee, Forever Broadcasting, is currently Forever Licenses, LLC. Post-transaction, Forever of PA, Inc., as reorganized through the aforementioned stock conversion, would be the 10% member of Forever Broadcasting, and Forever Licenses would be the 90% member. See Application at Exhibit 11. See also *infra* note 10 and accompanying text.

⁷ See Waiver Request at 3 (citing *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd 12559 (1999) ("Attribution Review Order")).

by each of these Four Principals in the assignor pre-transaction and in the assignee post-transaction, and asserts that the percentages remain exactly the same. Thus, Forever PA states, the Four Principals already “own” the four subject stations. On this basis, Forever PA argues that there will be no change in control if the Assignment Applications are granted.⁸ We disagree.

For purposes of administering its multiple ownership rules, the Commission focuses primarily on voting rights to assess the potential for investors to influence day-to-day station operations.⁹ The voting interests of each of the Four Principals will change substantially if the proposed transaction is approved and consummated: Forever PA acknowledges that more than 50 percent of the voting rights in the assignee will be redistributed in connection with the assignment of the licenses.¹⁰ This constitutes a change in control.¹¹ Forever PA’s reliance on the EDP rule is misplaced. That rule is an additional tool to determine whether certain traditionally non-attributable interests -- such as non-voting stock or debt -- should nonetheless be treated as attributable.¹² Here, however, the attribution status of the Four Principals is not in question. Each is acknowledged as an attributable investor in both the assignor and the assignee. It is not appropriate to analyze the nature of their ownership interests under the EDP rule for purposes of determining compliance with Section 73.3555(a).

An applicant for waiver must “plead with particularity the facts and circumstances which warrant such action” and has the burden to show that the public interest would be served better by waiver than by strict application of the rule.¹³ Forever PA has failed to sustain its burden in this regard. Although Forever PA has submitted a pleading styled as a request for a waiver, the pleading is limited to arguing that there is actually no violation of Section 73.3555(a) because the Four Principals allegedly already own the subject stations. Forever PA does not put forth any public interest benefits that might result if we

⁸ On this same basis, Forever PA suggests that the 6-station combination in the Altoona Metro is “grandfathered.” See Waiver Request at 3 (citation omitted).

⁹ See, e.g., 47 C.F.R. § 73.3555, Note 2; *Attribution Review Order*, 14 FCC Rcd at 12565-68.

¹⁰ Forever PA provides the following percentages representing the pre-transaction voting control of the shareholders of Forever of PA, Inc., which is the sole member of Forever PA, the assignor: Carol B. Logan (“Logan”): 38.3%; Donald J. Alt, Trustee (combined voting control over interests held by Donald J. Alt Grantor Retained Annuity Trust and Judy S. Alt Irrevocable Trust) (“Alt”): 24.4%; Kerby E. Confer, Trustee (Kerby E. Confer Grantor Retained Annuity Trust) (“Confer”): 24.6%; and Lynn A. Deppen (“Deppen”): 12.7%. Post-transaction, the voting control of the Four Principals in Forever Broadcasting, the assignee (as reorganized), will be as follows: Logan: 15%; Alt: 40%; Confer: 40%; and Deppen: 5%. See Waiver Request at 1-3; Application at Exhibit 11. See also *supra* note 6.

¹¹ See, e.g., *Metromedia, Inc.*, 98 F.C.C.2d 300, 305 (1984).

¹² See 47 C.F.R. § 73.3555, Note 2(i); *Attribution Review Order*, 14 FCC Rcd at 12578-91, *recon. granted in part*, 16 FCC Rcd 1097 (2001) (clarifying EDP rule at 1098-1115).

¹³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). See also 47 C.F.R. § 1.3 (the Commission may waive its rules for “good cause”).

were to permit this transaction, nor does it suggest any equitable considerations that might weigh in favor of waiving the rule. Essentially, Forever PA merely argues that no waiver is necessary – an argument that we reject, as discussed above.¹⁴ On the record before us, we cannot find good cause to waive Section 73.3555(a).¹⁵

For the foregoing reasons, the Waiver Request filed by Forever of PA, LLC IS DENIED, and the applications for assignment of the licenses of stations WFBG(AM) and WFGY(FM), Altoona, WLTS(FM), State College and WRKY-FM, Hollidaysburg, all in Pennsylvania, from Forever of PA, LLC to Forever Broadcasting, LLC, File Nos. BAL-20040712AAJ-AAM, ARE HEREBY DISMISSED.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

¹⁴ Accordingly, we also reject the suggestion (*see supra* note 8) that the 6-station combination in the Altoona Metro already exists and is grandfathered pursuant to the ownership provisions adopted by the Commission in 2002 *Biennial Regulatory Review, Report and Order and Notice of Proposed Rule Making*, 18 FCC Rcd 13620, 13807-09 (2003), *aff'd in part and remanded in part, Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372 (2004), *stay modified on rehearing*, No. 03-3388 (3d Cir. Sept. 3, 2004).

¹⁵ *See supra* note 13.